Supreme Court, U.S.
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90-1986

No. _____

In The

Supreme Court of the United States

1991 Term

Cheriel Jensen,

Appellant & Petitioner

vs.

Amanda Hawes, Gallardo, Chu & Hawes, Inc.: James Paul Collins; Sterns, Smith, Walker, Pensonen & Grell, and Does 1 through 100 inclusive

Appellees & Respondents

Petition for Hearing and Review to the Supreme Court of the State of California

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Petition for Writ of Certiorari

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Questions Presented for Review

California Code of Civil Procedure §437c., Summary Judgment, part (e), allows evaluation of evidence, incorporating separate standards of evaluation for each side, resulting in violation of both the Due Process and Equal Protection clauses of the Fourteenth Amendment and the Seventh Amendment to the United States Constitution.

In a malpractice action where discovery was not finished, not due, and not set for trial, the Calif. Code of Civil Procedure Summary Judgment §437c.(h), requires an extension of time to bring forth additional evidence or denial of motion when facts are asserted but cannot then be presented. Plaintiff was denied required time and thus the opportunity to present best evidence showing a well supported case in controversy.

Where the only support of summary judgment motion in a malpractice action are denials by defendents in the original action who retain economic interest in the outcome, denials should have been considered as general denials rather than evidence supporting motion.

Response to motion for summary judgment was filed and response due within the time of suspension of tolling provided by California Rules of the Court, Earthquake Rule. Severed phones and transportation caused by the Loma Prieta Earthquake prevented communication to plaintiff of the summary judgment motion until after judgment. Plaintiff was thus unable to assist her attorney in providing the best evidence to support her case. Additional evidence demonstrating a well supported case presented on request for rehearing was ignored. Motions to supplement the record with more evidence on appeal were denied. Fair hearing was denied with no time or forum in which to demonstrate best evidence.

Unbiased forum was denied as both appeal and reviewing courts had performed decisionmaking role which allowed aerial pesticide spraying resulting in injury to plaintiff in the original case.

Certain cases requiring complex proof are unfairly decided in summary judgment motions.

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7. Though denials are expected of defendants, denials by defendants of an original action in a two layer case are not generally expected because these parties are not obliged to further participation, and thus denials took Petitioner's attorney by surprise. No amount of advance preparation could have anticipated this particular collection of false statements, resulting in additional surprise. Remedy for judgment based on surprise is found in California *CCP § 473*. 14

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(Chronology)
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A.	Unnoticed Nighttime Pesticide Spraying Injury	July 13, 1981
	Claim to the State of California for injuries Claim Denied	February 10, 1982
B.	Original Complaint Filed for Personal Injury by then Attorneys now Respondents Santa Clara County, California Superior Court Action Number 517950	February 10, 1983
	Petitioner learned of failure to prosecute this action, specifically, failure to serve any defendants after 2-1/2 years had gone by	
	Attorneys substituted	
	Original complaint withstood preliminary motions, Judge Komar, S. C Co Sup. Ct. and amended	
	Demurs to Complaint San Joaquin Helicopter Co., Leave to amend, 30 days,	April 11, 1986
	Discretionary dismissal for failure to serve & prosecute, most defendants, CCP §583	through early April, 86
C.	Complaint Filed for Professional Malpractice, Intentional Misrepresentation, Negligent Misrepresentation, Suppression of Facts, San Francisco County Superior Court No. 873865	April 8, 1987
	Order on Demur & Motion to Strike	May 25, 1988
	General Denials	June 22, 1988
	Six discovery motions, parties only +Protective Order for Petitioner	May 25, 1988 through March 8, 1989
	Motion & Points & Authorities to Amend Complaint	December 20, 1988
	Order on motion	January 25, 1989
	First Amended Complaint filed	February 16, 1989
	Loma Prieta Earthquake, severe damage, freeways, and bridges to San Francisco	October 17, 1989

Opinions Below

and court buildings failed, local phones generally out, files toppled, continual shaking
(Court of Appeals
Earthquake Emergency Rule applied October 18, 1989
suspending tolling of time through November 1,1989)

Motion for Summary Judgement & or Sum..
Adj. of Issues filed October 19, 1989
Petitioner's Opposition to Motion for Summary Judgment & Sum Adj. of Issues due & filed October 30, 1989
Defendants Reply Filed November 8, 1989
Hearing on & granting motion November 13, 1989
despite requests for more time
Petitioner learned of summary judgment motion
and decision granting judgment Approx Nov., 24 1989
Motion for Reconsideration of ruling November 27, 1989
Summary judgment filed Judge Ira Brown, December 4, 1989
San Francisco Superior Court
Notice of Entry of Judgment December 13, 1989
Reconsideration motion denied at hearing December 19, 1989
Order filed Denying Petitioner Motion to Reconsider January 16, 1990
Petitioner Substitution of Attorneys filed January 26, 1990

Notice of Appeal filed in the California Court of Appeals, First District, Division 5 No. AO48491 January 29, 1990
Notice to Prepare Transcript March 26, 1990
Motions to submit additional evidence on Appeal
Denied by California Court of Appeals
Appeal Brief Filed
Appeal Denied December 11, 1990
Motion for Rehearing based on Earthquake Rule
Motion Denied

Petition for Review to California Supreme Court
Petition Denied March 11, 1991
Petition for Writ of Certiorari, U. S. Supreme Court June 10, 1991

JURISDICTIONAL STATEMENT

A. DATE OF ENTRY OF JUDGMENT:

Summary Judgment was filed December 4, 1989. Summary judgment was affirmed in the California Court of Appeal, First District, Division Five, in an unpublished opinion, See Appendix. Rehearing was timely requested and denied without comment. Petition for Review to the California Supreme Court of California was denied without comment March 13, 1991.

B. STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION:

Petition for Writ of Certiorari is brought under § 1257 of title 28--U.S.C.A. Judiciary and Judicial Procedure, wherein a final judgment of the California Supreme Court may be reviewed where the validity a statute of the State of California is drawn into question on the grounds of its being repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Seventh Amendment to the Constitution and where a right, privilege and immunity is specially set up and claimed under the Constitution and authority held and exercised under the United States, including the right to finish discovery including discovery from the state, the right to present the case in a methodical way and have it fairly heard, the right to have one's own testimony used when quoted, the right to bring forth witness on your behalf, the right to decision based on the case itself rather than procedural blocks, the right to confront witnesses, the right to council, the right to be outside without being contaminated with pesticide, and the right to be timely told if you are.

JURISDICTIONAL STATEMENT

C. CONSTITUTIONAL PROVISIONS VIOLATED BY THE STATUTES:

The Constitution of the United States of America, Amendment VII (1791):

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV (1869) from Section 1:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. STATUTES:

California Code of Civil Procedure, Chapter 5, Summary Judgment,,§437c.(e):

"(e) If a party is otherwise entitled to summary judgment pursuant to this * * * section, summary judgment shall not be denied on the grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations *in support* of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is the individual's state of mind, or

lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." [Italics added.]

California Code of Civil Procedure §437c.(k):

In actions which arise out of an injury to the person or to property, when a motion for summary judgment was granted on the basis that the defendant was without fault, no other defendant during trial, over Petitioner's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

California Code of Civil Procedure §437c.(h):

(h) If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that the facts essential to justify opposition may exist but cannot, for the reasons stated, then be presented, the court *shall deny* the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order that may be just. [Italics added.]

E. EARTHQUAKE RULE.

Earthquake Emergency Rule A. Appellate Courts

"Not withstanding any provision of rules 1 through 191, the time from October 18, 1989, through November 1, 1989, is excluded from the time allowed *or required* for doing any act related to commencing, pursuing, or deciding any proceeding in any reviewing court." [Italics added.]

California Rules of the State Court, 1990, Rule 23 (b)

Findings and Additional Evidence on Appeal, "Where documentary evidence is offered, either party may submit the original or a certified photostatic copy thereof and the court may admit the document in evidence and add to the record."

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Petition for Hearing and Review to the Supreme Court of the State of California

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Petition for Writ of Certiorari

Cheriel Jensen, pro se
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408 299-2521

CONCISE STATEMENT OF THE CASE

1. Overview.

This is a Petition for Writ of Certiorari of summary judgment for defendant attorneys in a professional malpractice case, encompassing intentional misrepresentation, negligent misrepresentation, and suppression of facts.

The first night of the aerial spraying phase of the Medfly Eradication Project in Santa Clara County, July 13, 1981, helicopters released pesticide and other substances over urban portions of the Santa Clara Valley for the first time.

The single area noticed to receive pesticide the first night was Palo Alto/Mountain View. But the pesticide was also sprayed onto *unnoticed* portions of the west valley, including portions of the city of Saratoga and specifically including Petitioner, who happened to be outside in the yard of her residence carrying out the State's instructions to take furniture inside or cover it in preparation for noticed spraying two days hence. Medfly project helicopters went overhead.

Relying on notices of the spraying schedule, and public promises not to spray before 12:00 p.m., Petitioner did not realize that night she had been doused with pesticide. She became very ill. She sought medical help first for a rash, specifically red spots. Because of inaccurately described symptoms, and public assurances of safety in the use of the pesticide and its accompanying chemicals, by state personnel, it's agents, it's contractors, and the Santa Clara Valley Medical Society, her dermatologist did not recognize red spots as the rash of malathion. His treatment for an uncertain

diagnosis of scabies caused Petitioner to be treated with additional pesticide. When she became aware of the cause of her illness four days had gone by. Medical assistance was delayed another six days because no doctor could be found in that period who understood pesticide poisoning. Effective medical assistance in the acute phase of the poisoning was not available. She was finally able to get some medical attention and diagnosis. It was too late to prevent the damage. No antidotes, which may have prevented some of the damage, were available at that time. Her symptoms included red spots, muscle spasms, cramps, difficulty breathing, severe jaundice, blurred vision, and almost non functional bowels.

Following the acute phase of illness, as a direct result of the pesticide exposure, Petitioner continues to suffer severe, painful and destructive muscle spasms, and reduced muscle strength and control; loss of peripheral vision, ability to focus, particularly on very fast moving objects, myopia; disabling gastrointestinal tract impacts; partial loss of sensation; arthritis (bone spurs grown into the spinal column); extreme skin sensitization and other conditions typical of malathion poisoning, possibly potentiated by the additional pesticide used mistakenly for initial treatment. She also suffers from numerous secondary effects.

Petitioner presented a claim for injuries to the State of California in a timely manner (Clerk's Transcripts pp. 1215-1216). It was rejected. A complaint for personal injuries was then filed by now Respondents on February 10, 1983 on behalf of Petitioner and others also injured naming the State of California, The Medfly Project, certain employees, contract agents, including helicopter companies, malathion suppliers and Does defendants.

Without the knowledge of Petitioner, no original Defendants of the underlying case were ever served. Petitioner discovered this non-service after two and one half years had gone by, during which whole time Petitioner believed her complaint and the whole of the action was being actively pursued. Unknown to her, no evidence was gathered. Original Attorneys, now Respondents had let the trail grow cold on FAA aircraft movement records, Sheriff records and other evidence. (Now they challenge Petitioner to reveal this very evidence that they are responsible for her not having.) Petitioner found another attorney but after monumental effort to complete service, her personal injury complaint was dismissed upon motions brought under California CCP § 583.410 et.seq. (See First Amended Complaint, Clerk's Transcripts, pp. 1147-1214.) (See Opinions Below section, this document, for the timing details.)

A malpractice complaint naming the original Attorneys, now Respondents, was filed on behalf of Petitioner. (See First Amended Complaint Clerk's Transcripts, pp. 1147-1214).

The Motion for Summary Judgment was filed October 19, 1989. Petitioner's reply was due and filed October 30, 1989. The entire time to prepare a reply to the motion was a time of extreme public (and private) emergency, with earthquakes disrupting the conduct of human affairs, the telephones disrupted, offices inaccessible for part of the time, transportation very difficult due to bridge and overpass failure and street lights functioning only sporadically. Files were toppled, bookshelves were emptied and critical documents were inaccessible. People from all parts of the Bay Area were fully preoccupied by damage to their homes and work places in the climate of continuing shaking followed by severe

rains. Voluntary declarations which required months to assemble on the part of Respondents could not be assembled by the Petitioner during this very short time available for response particularly under the circumstances of the continuing earthquake emergency. The Court recognized the circumstances of the earthquake emergency and responded with a rule to suspend time for a period. (See Jurisdictional Statement for the full text.)

Without being able to contact Petitioner, Petitioner's attorney presented the evidence he could locate including additional portions of Petitioners depositions describing these events and the details necessary to establish necessary facts.

Respondents had submitted the following exhibits to support their motion for summary judgment: a "BASE LOG," called in their depositions a "FLIGHT LOG", but saying itself to be a "BASE LOG," describing a helicopter already in the air at the top of the page, and the first time entry beginning a full hour and a half after the helicopters had gone over Petitioner. The log did not explain how the helicopter got there, where it started or any other fact of earlier activity.

In addition three declarations were submitted, signed by defendants to the original suit, a helicopter pilot, the helicopter company owner, and a Medfly project official, claiming they did not fly anywhere near Petitioner home that night, and they only had one helicopter up. They each claimed personal knowledge though only the pilot claimed to be actually in the air. The project official does not say where he was, what kind of contact, if any, he had with the claimed only helicopter pilot or any other detail to take his declaration out of the realm of hearsay. The helicopter company

owner describes watching "the helicopter" leave the cemetery, watching it till it is out of range, and he claims an absence of discussion with the pilot about deviation from the intended route. Also submitted in support were several carefully selected pages from Petitioner's depositions.

But these declarations are false and summary judgment should not have been awarded. Each of these individuals has a very great interest in seeing this case defeated. At the time they made their declarations, there was an active project underway to spray the Los Angeles area with malathion from the air using private contractors. Each of these deponents had a very large interest in defeating Petitioner's case, please the State, and continue to win contracts. The state had an interest amply demonstrated by the way they have aggressively defeated all local government opposition.

These individuals are not neutral observers. If shown to have sprayed at a time and place unnoticed they are subject to 7 USCS § 136j(a)(2)(G) and it's criminal penalties.

The California Statute CCP §437c.(e) invites evidence of this kind. Under normal rules of evidence these witnesses would have been subject to the evaluation of a jury trial because of their interest and relationship to the case. The California statute however protects these witnesses well (See Jurisdictional Statement, California Code of Civil Procedure §437c.(k)), insulating them from further inferential indictment.

Petitioner's depositions, if taken as a whole, should be enough evidence to show a case in controversy. But the whole of the depositions were not admitted. When Petitioner was told the motion had been made and decided without her knowledge she

quickly searched her attorney's files for medical records and other evidence and had her attorney request a rehearing. Declarations were obtained from neighbors of the Berry School, the project headquarters, which showed intense helicopter activity observed there from the very beginning of the project. These declarations contradicted the declarations in support because they show that project helicopters were in the area where Petitioner lives as well.

Petitioner's medical records show that she did indeed have a clinical picture of malathion poisoning, that it was discussed between her doctors, that it was reported to the state and that it was reported to the county.

The motion for rehearing was set and begun but then denied without any evidence whatsoever considered by the court.

Additional time requested to notice depositions to provide additional evidence that helicopters had passed over Petitioner raining malathion that night was rejected despite the earthquake rule, published by that time, which required that tolling of time be suspended for the specific period of disruption which coincided exactly with the 10 days Petitioner had for response to the summary judgment motion, and despite the law which specifically provides for extensions of time if requested. Such safeguards in the law as there are, were thus ignored and its application was arbitrary, unconstitutionally denying Petitioner the use of the law.

A fair trial is the essence of due process. Denial of the entry of evidence without consideration of that evidence is denial of fair trial and due process.

"A fundamental requirement of due process is the opportunity to be heard." *Grannis v Ordean, 234 US 385, 394, 58 L ed 1363,*

1369, 34 S Ct 779. "It is an opportunity which must be granted at a meaningful time in a meaningful manner." *Armstrong v Mango, 380 US 545, 14 L ed 2d 62, 66, 85 S Ct 1187.*

As soon as the Judge Brown was made aware there was a body of evidence on the other side he abruptly shut off discussion and denied the rehearing not bothering to review any evidence. Petitioner's attorney requested additional time but it was refused.

Petitioner substituted herself, replacing her attorney, and submitted notice of appeal. She then went forward even though discovery was closed to show that the declarations of original defendants are not true, and that her case is well supported.

Published documents described below are evidence showing that defendant's summary judgment is supported by declarations untrue on <u>every</u> point. (See Clerk's Transcripts, beginning p. 1131 for Defendant's three declarations at issue.) Presentation of this new evidence on appeal was made by motion under the authority of *California Rules of the State Court, 1991, Rule 23 (b) Findings and Additional Evidence on Appeal,*

> "Where documentary evidence is offered, either party may submit the original or a certified photostatic copy thereof and the court may admit the document in evidence and add to the record."

2. The burden of proof requires a showing of facts.

The burden is on the Petitioner to show sufficient basis for the reversal of the order or judgment from which he appeals. *Baldwin v Baldwin (153) 261 P.2d 16, 120 C.A.2d 493.* A Petitioner has duty to demonstrate that there is no substantial evidence to support a challenged finding. *Eisendrath v. Bank of*

America Nat. Trust & Sav. Ass's (1953) 258 P.2d 13, 118 C.A2d 434.

Petitioner prepared the best case possible given the severe constraints of having discovery effectively closed from the time of the motion for summary judgment to the present. Under these circumstances, finding documentary support has been largely limited to evidence embodied in published documents. Finding such evidence and a willing witness, under these circumstances, has been a heavy burden but has been met. Petitioner requested the Court of Appeals to allow her to meet the burden imposed by admitting the documents to add to the record.

3. Presentation of evidence is required to show the nature of Respondents submissions, to show that their motion has no support.

At the summary judgment stage the burden of proof is upon the maker of the motion. '[T]he trial court here incorrectly stated that it was Petitioner's "burden to go forward and demonstrate there was some breach of the standard of care [by Dr. Frye]." The Petitioner has no such burden until the defendant negates the issue upon which the summary judgment is brought.' *Jaridijon Salasguevara, a Minor, etc., v Wyeth Laboratories, Inc. et al, 90 C.D.O.S. 5669, at 5671.*

The superior court accepted Respondents evidence, effectively reversing the burden to Petitioner. A showing by Petitioner was made by the evidence presented on rehearing but rehearing was abruptly denied. The larger body of evidence was submitted to the Court of Appeal to amply show that original Respondents' declarations are untrue in every material respect.

Independent witnesses to the events of the night of the poisoning report entirely different observations than Respondents and defendants in the original case, refuting each and every point Respondents make. (Respondents claimed that one helicopter only flew that night and therefore Petitioner could not have seen three, that this one helicopter flew only after midnight, that it flew only in the north county, that it flew only from the Gates of Heaven cemetery (north of Petitioner), that there was only one pilot, that the "BASE LOG" represents the *flight* activity of that night, that spraying took place only after midnight, and therefore that three helicopters could not have been in the vicinity of Petitioner spraying that night before midnight.)

Independent witnesses to the events that night are found in three news accounts published the following day. [These exhibits are found with the Motion to admit Appellant's Exhibits 1 through 7 in the record on appeal.] They report observing three helicopters flying in tandem (as Petitioner saw them). They report one of the three spraying. These observations were made both before and after midnight. Mr. Bauer (*San Jose Mercury*, July 14, 1981) reports seeing pesticide tanks filled after midnight, this after earlier spraying was observed by Mr. Hanner (*Peninsula Times Tribune*, July 14, 1981). Therefore there had to be an earlier fill up not reported on the base log, showing concealment of the earlier events. Mr. Hanner reported observing the approach of helicopters from the south. Mr. Josephson reported in the second hearing that they flew from Hayward airport which is east, not south of Palo Alto. But Petitioner lives in the west part of Santa Clara County which *is* south of Palo Alto.

Two reports, Petitioner's Exhibit 1 and Exhibit 7 report two pilots that night. Underlying defendant, Mr. Josephson (Exhibit 7, *Peninsula Times Tribune*, July 17, 1981) contradicts part of his own declaration on the record of this case, that there was only one pilot. He told the press he not only used two pilots to fly his helicopters but explained why. The issue of the number of pilots was central to the discussion reported there and not incidental. Thus it was not likely to have been a misprint or offhand mistake. Therefore even the number of original defendants [including Does] and direct parties are at issue.

In addition to the news reports, one account presented is a photograph published in the *Peninsula Times Tribune* the next day. This photograph taken from the air from a helicopter (showing its platform suspended in the air) shows a Medfly project helicopter from a position above and to the side of it, proving that at least two helicopters were in the air that night, the one photographed and the one carrying the photographer. This photograph disproves Respondents declarations claiming only one helicopter flew. The three detailed accounts published the next day are Petitioner's Exhibits 1, 2 and 3. These accounts bridge any memory gap. Petitioner's witnesses are innocent bystanders. Unlike Respondents witnesses, they have no knowledge of Petitioner and could have no interest in whether she should prevail. They simply reported their observations to the public, their motivation for accuracy being their long term status as reporters with credibility in the local community. (The arrival of the helicopters in the aerial spraying of malathion was widely heard and observed. An inaccurate report would be subject to letters to the editor and

retractions. Scanning the newspapers for the next two weeks no retraction or letter of contradiction followed these reports.)

Petitioner has also found additional information on the helicopter activities the night of the spraying. The accounts presented by Respondents conceal the actual location of the filling of malathion tanks before midnight, the route they took to the north county and the timing of this event. Petitioner presents a witness to these events of that first night of spraying who witnessed the filling of tanks, and the leaving for the north county. This witness, the Manager of the South County Airport, Joe Carbaugh, was present at the south county airport and saw the helicopters leave from that airport. (Declaration is Exhibit 6, attached to the Motion to admit Appellant's Exhibits 1 through 7 on appeal, in the record on appeal.) He saw the filling of pesticide tanks before they left the South County Airport and he saw them leave before midnight. Using the attached map, Exhibit 5 (also part of the exhibits), a logical route can be easily seen which passes over their Berry School headquarters and over Petitioner's dwelling. Neighbors of the headquarters site remembered helicopter activity from the very beginning of the project. Their statements are found in Petitioner's Appendix, Exhibit N. Knowledge of when and where they started, and observations of the end points that night brackets the time putting helicopters right over Petitioner at the time she saw them on their way to Palo Alto. They were seen with spraying already underway as they approached Palo Alto from the south (See the Richard Hanner account, Exhibit 3.) They reached Palo Alto, also before midnight and long before the activity they report on their spoliated base log. (The base log is part of the Declaration of Mr.

Don Henry, that package beginning on page 1131 of the Clerk's Transcripts.)

4. Triable issues are shown using Exhibits and documents submitted to the Superior Court and to the Court of Appeals.

With Exhibits 1 through 7, published observations and the declaration of a witness to the actions of original defendants, Petitioner shows Respondent's declarations conceal the truth. "Motion for summary judgment is appropriate only where no triable issue of material fact exists and where moving party's affidavits set forth sufficient facts to sustain judgment in its favor." *Estate of Pitzer (App. 2 Dist.1984) 202 Cal.Rptr. 855, 155C.A.3d 979.)* Respondent's declarations are fully contradicted by the evidence presented. "Any doubts as to propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion." *(Dillashaw v Ayerst Laboratories, Inc. (1983) Cal.Rptr 68, 141 C.A.3d 35.)* and "[d]oubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion. (*People ex rel. Riles v Windsor University, Inc. (1977) 139 Cal.Rptr 378, 71 C.A.3d 326.)* The purpose of summary judgment is to establish whether or not lawsuit contains triable issues of fact; if it does, summary judgment may not be awarded. *Pasadena City Fire Fighters Ass'n v. Board of Directors of City of Pasadena (1974) 112 Cal. Rptr 56, 36 C.A.3d 901.*

5. Extrinsic Fraud is shown using Exhibits 1 thru 7.

"A Court of equity under proper circumstances will set aside a judgment obtained by fraud. *(15 Cal.Jur. 8, § 120.)* The fraud

must be extrinsic and collateral. *(Huron College v. Yetter, 78 Cal.App.2d 145, 149 [177 P.2d 367].)* Extrinsic or collateral fraud is defined in *Gale v. Witt, 31 Cal.2d 362, 365 [188 P2d 755]):* 'The fraud which will justify the setting aside of a final judgment by a court of equity must be of such a character as prevents a trial of the issues presented to the court for determination. [Citations.] Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. . . .[T]o constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the Petitioner from having his day in court." *(Smith v. Smith [125 C.A. 2d 154, at 161; 270 P2d 613]).* This is exactly the case here. The evidence presented shows this fraud.

6. Time should have been provided for discovery, under California *CCP § 437c(h)*, for proper noticing of depositions to allow Petitioner to provide evidence that Respondent's declarations are false.

Petitioner's Attorney was surprised by Respondent's declarations and needed time to provide the proof against them, but the court would not allow the required time. Rehearing was held such a short time from the summary judgment hearing that noticing deadlines for depositions, for the second time, effectively precluded normal discovery, and thus discovery has remained effectively closed from the time of the motion.

> "If it appears from the affidavits submitted in opposition to the motion for summary judgment . . . that facts may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to

be obtained or discovery to be had and may make any other order as may be just." California *CCP § 437c(h)*

Petitioner's physicians' records provide ample evidence that there was malathion poisoning. Some of these records were presented with the motion for reconsideration. No others known to Petitioner, except the Medfly project, were flying around at the time spreading malathion from the air in the Santa Clara Valley. Still the medical evidence was ignored in favor of concerted denials on the part of original defendants. It should not have been ignored. Petitioner should have been given time under California *CCP § 437c(h)* to present evidence that could not at the time be presented to refute Respondent's declarations because discovery was closed. Though the Superior Court should have allowed sufficient additional time under this section, new evidence was also submitted in Petitioner's Appendix A through V to the Court of Appeals (Table in the Appendix). It shows the declarations of original defendants to be false, causation is still an issue; and that there is a record of medical evidence which shows that malathion poisoning took place (Exhibits A through V listed in Appendix). Also shown is a very real cover-up that has handicapped discovery.

The request for time enough to collect evidence should have been granted.

7. Though denials are expected of defendants, denials by defendants of an original action in a two layer case were not expected because these parties are not obliged to further participation, and thus these denials took Petitioner's attorney by surprise. No amount of advance preparation could have anticipated this particular collection of false statements, resulting in additional surprise. Remedy for judgment based on surprise is found in California *CCP § 437c(h)* .

Policy of law is to have every case litigated on its merits, and law looks with disfavor on a party who, regardless of the merits of the cause, attempts to take advantage of mistake, surprise, inadvertence, or neglect of his adversary. *Reed v. Williamson (1960) 8 Cal.Rptr 39, 185 C.A.2d 244; Andres v. Armstrong (1959) 335 P.2d 1005, 168 C.A.2d 344.* This section is remedial and should be construed liberally to promote the ends of justice. *Andres v. Armstrong, Ibid.; Cason v. Glass Bottle Blowers Ass'n of U. S. and Canada (1952) 247 P.2d 931, 113 C.A.2d 263; Marston v. Rood (1944) 144 P.2d 863, 62 C.A.2d 435; Bonfilio v. Ganger (1943) 140 P.2d 861, 60 C.A.2d 405.* As can be seen, there is solid evidence and a public official witness, presented here, to overcome the surprise of Respondent's declarations, each found despite the closed discovery period. Time was needed to gather it, but time was not granted by the court below as it should have been. Purpose of this section providing for relief from judgments or orders is to give a party opportunity of repairing damage done because of his failure or that of his counsel to make a showing he could have made, provided that such failure was due to mistake, inadvertence, surprise or excusable neglect. *Stephens v. Baker & Baker Roofing Co. (1955) 280 P.2d 39, 130 C.A.2d 765.*

ARGUMENT

Summary judgment in Cheriel Jensen v. Amanda Hawes, et. al., a malpractice suit in which underlying attorneys failed to serve or prosecute a case of personal injury resulting from unnoticed

nighttime aerial pesticide spraying by the State of California and its contractors, was based on a state statute which prescribes improper, unfair and unequal consideration of evidence in violation of the *Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution*. Summary judgment was also abuse of discretion in violation of provisions of the statute.

Summary judgment motion was supported by double hearsay statements of original defendants, one defendant not explaining where he was the night he asserted a single helicopter in the air and that it did not fly over Petitioner, one defendant explaining he was at a site far to the north but not aboard the craft. All three declarations were from defendants to the original action who retain an economic interest in the outcome of the case and thus they are hearsay according to the rules of evidence. Their declarations were said to be based on a document used to refresh their memory which claims on its face to be a "Base Log" but which original defendants claimed was a "Flight Log." This document begins at a time a full hour and a half *after* the overflight over Petitioner by describing a flight already in the air, not explaining where it came from, when it came, or where malathion was loaded. This unattributed document does not say when it was prepared, who prepared it, or what document it is excerpted from. For these reasons it is spoliated and was improperly admitted.

At the same time, Petitioner was not allowed to rely even on her own deposition, certain answers were called hearsay, deposition answers were taken out of context and misquoted and the bulk of her depositions excluded from the record. No part, either that part in the

record or that part she tried to submit with no success, seems to have been read by any court.

Petitioner's deposition that says Petitioner was informed by an unidentified man at the Med-fly Project Center that it was possible that malathion was sprayed over her residence. (Jensen deposition page 78, lines 6-28.) This statement was called hearsay. Respondent's construction of it was, "Fact No. 7: No one has ever told Petitioner that malathion was sprayed over here [sic] residence on the night of July 13, 1981." This is simply not a fact, only an assertion by Respondents, but it became the twisted and only basis for summary judgment in the Superior Court.

Petitioner was denied time to bring forth additional evidence allowed by the earthquake rule, though deadlines to respond were wholly within the time allowed by the rule. Petitioner herself was never contacted or even aware of the motion or hearing until just before the request for rehearing was due, and thus she was unable to bring in additional critical evidence for the reply to the motion and hearing. Additional time was requested to respond to the summary judgment motion but time was not allowed and rehearing was denied.

The Court of Appeals denied two rounds of motions to submit critical evidence, denied the use of the earthquake rule, under which time should have been suspended, further misquoted Petitioner by using misquotes of Respondents rather than Petitioner's own deposition answers in the record. In an unpublished opinion, the Court of Appeals upheld the summary judgment saying there was no good reason the evidence could not have been submitted earlier.

(In addition to exhibits described on pages 9 through 12, a list of the specific evidence Petitioner tried to get recognized is found in the Appendix, list of Exhibits A through V.)

The California Supreme Court denied review. Both the Appeals Court panel and the State Supreme Court acted on this case even though they were directly involved in the proceedings of the original case, because, on the night of the spraying event they had upheld the Superior Court finding that aerial pesticide spraying at night would be safe and could proceed. Their roles in these decisions to allow the spraying was one of a decision making body rather than of reviewer with particular expertise. Both bodies should have called for an impartial panel.

On these issues Petitioner requests this court to review these proceedings and the portions of the statutes on which they rest.

A. *CALIFORNIA CODE OF CIVIL PROCEDURE, CHAPTER 5, SUMMARY JUDGMENT*, §437c.(e,) WHICH FORMS THE FRAMEWORK FOR THE DECISION IN THIS CASE IS UNCONSTITUTIONAL UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

California Code of Civil Procedure, Chapter 5, Summary Judgment, §437c.(e):

> "(e) If a party is otherwise entitled to summary judgment pursuant to this * * * section, summary judgment shall not be denied on the grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations *in support* of the summary judgment, except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is the individual's state of mind, or lack thereof, and that fact is

sought to be established solely by the individual's affirmation thereof." (Italics added.)

Declarations of witnesses and other submissions are, by definition, a discussion or assertion of facts: what, where, when, who, how, why.

If they were an assertion of law alone, attorneys briefs would be required instead. If the existence of facts (display of fact, all taken at face value) and not the content and evaluation of facts is truly what the statute provides, the existence of statements of someone, asserting knowledge of the facts of the claims at issue, and a noting some disagreement between the versions of facts of the parties would seem to be sufficient to resist a motion of summary judgment. In this case there is dispute. All but 9 of 40 "facts" prepared by the Respondents are disputed. (Clerk's Transcripts, pp 1157 through 1161). The single finding in the superior court could not be found in any of Petitioner's papers. There should be no doubt that a case in controversy exists. Federal and state cases throughout the country seem to be of two minds.

In Federal cases there must be a showing there is a case for trial on the one hand. It appears that although deadlines are very short, time is provided to make the showing when needed. The line of state cases, until 1986, seemed generally, though not always, to require a showing that there is a fool proof affirmative defense to the complaint. The timing seems to be more absolute.

Federal law and state and federal cases throughout the country emphasize that it is existence of some fact and not its evaluation that is at issue,[1] though some Supreme Court cases have introduced new degrees of evaluation.[2] into the procedure. This case has allowed evaluation of evidence, even to the extent of complete misquotation.

The [unintended] merging of two summary judgment concepts has severely weakened the guarantees of the Seventh Amendment, and the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment.

1. Fundamental constitutional issues of fair trial, due process, and confrontation of witnesses are raised where weighing of facts in summary judgment proceedings is allowed, and to this list is added the issue of equal protection when that evaluation process incorporates uneven standards, as here.

A party to a civil action . . . who testifies in his own behalf stands in every respect on the same footing as every other witness.

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[1] District Court's function in ruling on motion for summary judgment is to determine if any genuine issue exists for trial, not to resolve any factual issues, and to deny summary judgment if material facts are in dispute; summary judgment is only appropriate when no genuine issue of material fact remains to be decided and when undisputed facts, viewed in light most favorable to non moving party, entitle movant to judgment as a matter of law. *Fed. Rules Civ. Proc., Rules 56, 56(c), 28 USCA E.E.O.C. v Patrick Henry Educ. Assoc., 74 F. Supp 670. N.D. Ohio, 1990*

The purpose of a proceeding for summary judgment is to determine whether a defense exists, and, where a defense raising on issue of fact as to Petitioners right to recover is set up, a summary judgment must be denied. *Shirley v. Ellis Drier Co., 39 N.E.2d 329, 331, 379 Ill. 105.* The purpose of summary judgment procedure is, not to try an issue of fact, but rather to determine whether there is issue of fact between parties. *Moroni v. Gulf, M. & O.R. Co., 230 NE 2d 55, 59, 86 Ill. App. 2d 426.* Motion for summary judgment is vehicle for disposing of controversy without necessity of trial; it is summary disposition of issues in order to efficiently resolve litigation. *(Porter Coatings v. Stein Steel and Supply Co., 278 S.E.2d 377, 378, 247 Ga. 631.)* Summary judgment is procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved. *American State Bank of Killdeer v. Hewson, N.D., 411 N.W.2d 57, 60.* Summary judgment is procedural device available for promptly and expeditiously disposing of controversy without trial if there is no dispute

U.S.---U.S. v. Klass, C. C.A. NY.), 166 F 2d 373.)) except in California. In California interest and hearsay cannot be discussed for Respondents but are harshly judged for Petitioner, as here, in violation of the Constitution's Fourteenth Amendment Equal protection Clause.

It appears, from a reading of the California Code Civ. Proc. §437c.(e) (above) that all individual statements *in support* of the motion for summary judgment are to be taken at face value to reveal if there are contested points. Here the statute allowed hearsay admitted on the one side, using declarations from the accused perpetrators, two of whom do not say how they came to have personal knowledge of all helicopter locations in flight, their statements taken at face value and their interest buried forever after the motion. Certain portions of Petitioner's deposition's however that were admitted *were* evaluated and called hearsay. They were not hearsay.

2. The facts upon which a decision rests must have directly to do with proving or disproving the underlying complaint.

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as to either material facts or inferences to be drawn from undisputed facts, or whenever only a question of law is involved. *Umpleby By and Through Umpleby v. State By and Through North Dakota State Game and Fish Dept., N.D., 347 N.W. 2d 156, 159.* A summary judgment may be loosely defined as a judgment decreed by a court in a case pending before it when as a matter of law proceedings show there is no issue between parties. *Guerrero v. American Hawaiian S.S.Co., C.A.Cal., 222 F.2d 238, 240.*

[2]*Celotex Corp. v Catrett, 477 U.S. 317 (1986.), Anderson v Liberty Lobby, 477 U.S. 242 (1986), Matsushita Electric Industrial Corp. v Zenith Radio, 475 U.S. 574 (1986).*

If the facts chosen for comparison misconstrue the issues (as here), agreement on the specific items raised in the motion may not support the judgment prescribed by the statute. In this case the single finding of Superior Court is a wholly non-essential part of the proof of the case. This finding was repeated and elaborated for the Court of Appeals in this case.

Petitioner's medical doctors diagnosed a clinical picture of malathion exposure and resulting illness, wrote it in their notes, confirmed it by letter, and reported it to both County and State authorities as required for pesticide exposure. This evidence was presented to the Superior Court in time for rehearing. (Expert medical testimony is not due until no later than the 10th day after the initial trial date has been set, or 70 days before the trial date, whichever is closer to the trial date. (§ 2034, Subd. (b), California Evidence Code.) *Kennedy v. Modesto City Hospital, 221 Cal.App.3d 575, 576; 270 Cal.Rptr. 544 (June 19, 1990).* Thus no expert medical witnesses are due in California at the summary judgment stage. A case may rest primarily on such witnesses. Thus a false issue was raised, *summarily evaluated based on Respondents construction and not a full understanding of the case*, and became the subject of the ruling at the Superior Court level and reinforced at the Appellate level.

B. EVIDENCE WAS IMPROPERLY AND UNFAIRLY EXCLUDED. PETITIONER'S EVIDENCE WAS NOT REVIEWED BY THE COURT BELOW.

1 THE EARTHQUAKE RULE WAS IGNORED.

Special Rules adopted by the California Courts for suspension of tolling of time during the earthquake

disaster were not available to Petitioner in violation due process and equal protection promised in the United States Constitution, Fourteenth Amendment.

EARTHQUAKE RULE.
Earthquake Emergency Rule A. Appellate Courts:
"Not withstanding any provision of rules 1 through 191, the time from October 18, 1989, through November 1, 1989, is excluded from the time allowed *or required* for doing any act related to commencing, pursuing, or deciding any proceeding in any reviewing court." [Italics added.]

Petitioner's Reply to Motion for Summary Judgment was due, and had to be wholly prepared, within the time of the Courts' declared earthquake emergency. Additional time requested to present evidence was not allowed, a motion for rehearing at the Superior Court was denied, and motions to augment the record on appeal were denied. Petitioner contends each of these denials was an abuse of discretion, caused critical evidence to be ignored, even its existence denied, and caused a meritorious cause to be summarily denied. The ruling is contrary to the purpose of summary judgment:

> "The purpose of summary judgment statute ([California] Code Civ. Proc., § 437c), is to eliminate the necessity of trying sham or meritless cases, not to stop facially meritorious cases at the summary judgment stage by reason of a procedural bar that may be overcome at trial." *Kennedy v. Modesto City Hospital* 221 Cal.App.3d 575, 576; 270 Cal.Rptr. 544 [June 19, 1990]

The ruling is contrary to the intent of the earthquake rule. Petitioner has not been allowed to have the following body of information considered to support her claims: medical records which describe the poisoning, and the declaration of the manager of the South County Airport who observed the helicopters filling malathion and taking off shortly before Petitioner was sprayed. (The route from the South Santa Clara County to Palo Alto goes over Petitioner's residence. Observations of this primary witness would

fully refute Respondents' declarations of original defendants), published reports describing the observation of the flights and spraying of the helicopters at the other end far earlier than original defendants admit to and just after Petitioner was sprayed. These published accounts are essential evidence and were denied admission.

During the earthquake emergency phones were knocked out, bridges and overpasses were down, and traffic control lights were out making communication difficult at best, file cabinets and file boxes were toppled making the files very hard to properly review, and persons were preoccupied with digging out of piles of broken glass, out of electricity, water and primarily concerned with life safety related matters as the earth continued to shake,

During this time Petitioner did not know of the motion and was not contacted by her then attorney until just before the papers for petition for rehearing were due.

> For summary judgment motion to be well grounded in fact, as required by Rule 11 motion must contemplate the entire record. 28 U.S.C.A.--Lenox, Inc. v. Triangle Auto Alarm, a Div. of Triangle Stereo, Inc., 738 F.Supp. 262.

2. When a case is not heard before a judge or a jury, evidence should not be excluded on appeal.

3. An appeal is not properly reviewed if the issues presented for review are not reviewed.

There is no substitute for proper quotation. Petitioner insists that if she is to be quoted, the record of what she said be before the court and at the least include whole answers, and that her own words be used.

The right of a person to testify in his own behalf is fundamental. *In re Waite's Guardianship (1940) 97 P. 2d 238, 14 C. 2d 727.*

C. PRECEDENTS SET BY THE CALIFORNIA COURTS, OTHER STATE COURTS AND BY THE FEDERAL JUDICIAL SYSTEM WERE NOT FOLLOWED IN THIS CASE.

1. Credibility of witnesses was not reviewed by any court. The proper body to review credibility is a jury.

The establishment of facts might be tolerated if the facts were truly outside framework of the particular case and if witnesses were not subject to influence by their own interest or the interest of the party for whom they are testifying. In setting forth a process to establish facts, this section prohibits cross examination, opportunity for confrontation, and determination of credibility. It instructs a judge that these issues are to be *specifically ignored* even if the circumstances point directly to the significance of credibility or particular interest (as here). The use of this procedure allows the participants in injuries and even crimes to escape civil proof, notoriety and civil responsibility by their own coordinated declarations. By allowing witnesses to testify and completely escape confrontation or any test of their interest or credibility the *California Code of Civil Procedure §437c.(e)* does not conform to constitutional due process set forth in the whole line of cases determined by this court beginning with *Brown v Walker (1896) 161 US 591, 40 L Ed 819, 16 S Ct 644*, which held that if a witness elects to waive his privilege and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. In *Brown v United States (1958) 356 US 148, 2 L Ed*

2d 589, 78 S Ct 622, 72 ALR2d 818, reh den 356 US 948, 2 L Ed 2d 822, 78 S Ct 776, any witness, in criminal or civil proceedings who voluntarily takes the stand and offers testimony on his own behalf may be impeached and his testimony assailed like any other witness. Other cases which recognize that a witness who testifies as to incriminating matters losses privilege include: *United States ex rel. Vajtauer v Commissioner of Immigration (1927) 273 US 103, 71 L Ed 560, 47 S Ct 302 (disapproved on other grounds Garner v United States (1976), 424 US 648, 47 L Ed 2d 370, 96 S Ct 1178); United States v Murdock (1931) 284 US 141, 76 L Ed 210, 52 S Ct 63, 82 ALR 1376, later app 290 US 38978 L Ed 381, 54 S Ct 223; Rogers v United States (1951) 340 US 367, 95 L Ed 344, 71 S Ct 438, 19 ALR2d 378, reh den 341 US 912, 95 L Ed 1348, 71 S Ct 619.*

This line of cases appear to address not only disclosure with respect to matters voluntarily brought forth but also to other matters and details at issue.

2. Criminal activity is an issue in the evaluation of credibility of Respondent's witnesses.

Witnesses were participants and defendants in the original action. By using the California summary judgment statute, the witnesses who may have been, and in this case are, involved as accused participants in the offense escape the confrontation requirement entirely by collaboration with each other and/or with the defense attorney, and by submitting testimony in writing and thus outside of the confrontation requirement.

Where the evidence might tend to show the existence of a cause of action against the witness he is incompetent, even though an

action against him is barred by the statute of limitations. *Iowa---Culbertson v. Salinger, 108 N.W. 454, 131 Iowa 307, 70 C.J. 255,* note 3. A person who, although not a party, was interested in the result of the action was also held incompetent. *McEwen v. Johnson 7 Cal. 258.*

3. Summary Judgment proceedings were not appropriate in a case which was decided only on declarations of original defendants to unnoticed pesticide poisoning where credibility is an issue and there was no jury.

D. SUMMARY JUDGMENT CAUSED UNAUTHORIZED AND IMPROPER BIFURCATING OF THE TWO LAYERS OF THIS CASE, strictly prohibited by *Cook v. Superior Court for San Diego County* (1971) 97 Cal.Rptr. 189, 19 C.A.3d 832. Original defendants were incorrectly used as the only witnesses.

E. THE CALIFORNIA COURT OF APPEALS PANEL AND THE CALIFORNIA SUPREME COURT HAD PLAYED THE DECIDING ROLE IN THE INITIATION OF THE SPRAYING ACTIVITY DURING WHICH TIME PETITIONER WAS INJURED, AND THUS COULD NOT BE UNBIASED.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and the reality of

fairness, generating the feeling, so important to popular government, that justice has been done, by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbitrator is not predisposed to find against him." *Marshall v Jerrico, Inc. (1980), US) 64 L Ed 2d 182, 100 S Ct 1610.*

The California Courts have an underlying conflict (and a large potential for bias) due to their direct participation in the decision to spray which is at the heart of the underlying case, the very issues on which the case below turned. They agreed to allow the aerial spraying the very night Petitioner was sprayed, by affirming the decision by Judge Bruce Allen to allow it and his finding that it would be safe. Now they are faced with a case in which a Petitioner was seriously injured. If Petitioner prevails in her proof of injury these Courts below share responsibility. They cannot be impartial. Both courts should have called for an outside panel. After having played a direct role in the decision to allow the spray project to proceed that night, both the California Court of Appeal and the California Supreme Court have now violated standards of objectivity by hearing a case to which they were so intimately linked, denying Petitioner the right to be heard before a jury and turning a blind eye to the damage they caused Petitioner, denying:

1. The right to present evidence in support of her case even though no jury ever heard the case, and even though the decision was not one of law but decided on evaluation of assertions of fact alone.

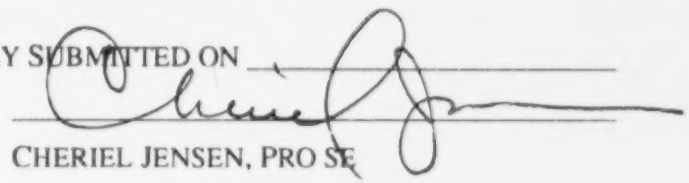
2. The use of the time specifically provided by the Earthquake Rule even though the entire time required for response to the motion for summary judgement was

during the time specifically excluded for tolling time due to the chaos of the post earthquake period.

SUMMARY

For the reasons here presented Petitioner respectfully requests this honorable court to grant this petition to set aside the summary judgment so her case can go forward.

RESPECTFULLY SUBMITTED ON _____



CHERIEL JENSEN, PRO SE